

Where the change in 8(a) ownership represents less than a 10 percent interest in the concern or results from the death or incapacity due to serious, long-term illness or injury of a disadvantaged principal, prior approval is not required; however, the concern shall notify SBA as soon as possible. Continued participation of the 8(a) concern under new disadvantaged ownership requires SBA's determination that all individual and business eligibility requirements of these regulations are met by the concern and the new owners.

(j) A Program Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) program.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990; 60 FR 29975, June 7, 1995]

§ 124.104 Control and management.

Except for concerns owned by Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations, or Community Development Corporations (CDCs), as defined in § 124.100, an applicant concern's management and daily business operations must be conducted by one or more owners of the applicant concern who have been determined to be socially and economically disadvantaged. (See § 124.112 for the requirements for tribally-owned entities and those owned by ANCs, § 124.113 for requirements for concerns owned by Native Hawaiian Organizations, and § 124.114 for requirements for CDC-owned concerns). In order for a disadvantaged individual to be found to control the concern, that individual must have managerial or technical experience and competency directly related to the primary industry in which the applicant concern is seeking certification.

(a)(1) An applicant concern must be managed on a full-time basis by one or more individuals who have been found by SBA to be socially and economically disadvantaged, and such person(s) must possess requisite management or technical capabilities as determined by

SBA. In addition, for those industries requiring professional licensing (i.e., public accountancy, law, professional engineering, etc.), SBA must determine that the applicant concern or individuals employed by the applicant concern hold(s) the requisite license(s).

(2) At least one socially and economically disadvantaged full-time manager must hold the position of President or Chief Executive Officer. This precludes outside employment or any other business interest by the individual which conflicts with the management of the firm or hinders it in achieving the objectives of its business development plan. Any disadvantaged person upon whom 8(a) eligibility is based, who is engaged in the management and daily business operations of the 8(a) concern and who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the written approval of SBA, prior to engaging in such employment. SBA will review such notification for compliance with the requirement of day-to-day management and control of the 8(a) concern.

(b) The socially and economically disadvantaged individual(s) upon whom eligibility is based shall control the Board of Directors of an applicant or 8(a) concern, either in actual numbers of voting directors or through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation.) This does not preclude the appointment of non-voting or honorary Directors so as to allow the firm to have a varied and experienced Board of Directors. All arrangements regarding the structure and voting rights of the Board must comply with applicable state law.

(c) Individuals who are not socially and economically disadvantaged may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. Such individual(s), their spouses or immediate family members who reside in the individual's household may not however:

(1) Exercise actual control or have the power to control the applicant or 8(a) concern.

(2) Be an officer or director or more than a 10% owner, stockholder, or partner of another firm in the same or similar line of business as the applicant or 8(a) concern.

(3) Receive excessive compensation from the applicant or 8(a) concern as directors, officers or employees. Individual compensation from the concern in any form, including dividends, which is paid to a nondisadvantaged owner, his/her spouse or immediate family member residing in the same household will be deemed excessive if it exceeds the compensation to be received by the Chief Executive Officer or, if no Chief Executive Officer, the President; provided that, with the written consent of the AA/MSB&COD or designee, the Chief Executive Officer or President may elect to take a lower salary than such a nondisadvantaged individual if it is demonstrated to be in the best interest of the applicant or 8(a) concern.

(4) Be former employers of the disadvantaged owner(s) of the applicant or 8(a) concern, unless it is determined by the AA/MSB&COD that the contemplated relationship between the former employer and the disadvantaged individual or applicant concern does not give the former actual control or the potential to control the applicant or 8(a) concern and such relationship is in the best interests of the 8(a) firm.

(5) Have an equity ownership interest of more than 10 percent in another 8(a) concern.

(d) Nondisadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) Nondisadvantaged individuals control the voting Board of Directors of the 8(a) concern, either directly through majority voting membership, or indirectly, if the by-laws allow nondisadvantaged individuals to block any action proposed by the disadvantaged individuals through negative control. For example, an equal number of disadvantaged and nondisadvantaged voting directors could create negative control.

(2) A nondisadvantaged individual, as an officer or member of the Board of Directors of the 8(a) concern, or through stock ownership, has the power to control day-to-day direction of the business affairs of the concern.

(3) The nondisadvantaged individual or entity provides critical financial or bonding support or licenses to the 8(a) concern which directly or indirectly allows the nondisadvantaged individual to gain control or direction of the 8(a) concern.

(4) A nondisadvantaged individual or entity exercises voting control of the Participant through a nominee(s).

(5) A nondisadvantaged individual or entity controls the corporation or the individual disadvantaged owners through loan arrangements.

(6) Other contractual relationships exist with nondisadvantaged individuals or entities, the terms of which would create control over the disadvantaged concern.

[54 FR 34712, Aug. 21, 1989, as amended at 60 FR 29975, June 7, 1995]

§ 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 124.112(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or